Regulatory flexibility under CalFed:
as a tool for the Water Management Strategy and the Environmental Water Account

ESA (USFWS, NMFS, DFG)

Under as substantial a change in operations as has been envisioned under the various gaming scenarios and with the change in CVP operations that can be expected following the court's immanent decision, it seems a foregone conclusion that the opinions, especially their take provisions, will require revisiting.

Take issues
The South Delta actions of the Water Management Strategy are expected to result in greater pumping rates at the State facilities and greater total exports from the south delta. Use of the Joint Point of Diversion will allow some of the federal export demand to be met via the state pumps. Larger rates may allow more careful timing and therefore a reduction in the number of fish expected to be entrained. Greater levels of overall export may restrict the flexibility that greater pumping capacity affords, and therefore an increase in expected entrainment.

Ecosystem restoration actions, including the EWA, present an unusual issue for take provisions. Program success will increase expected entrainment through enlargement of the population. Improvement in screen efficiencies will also require revisiting the expected impacts of entrainment on the listed species.

Other opinion requirements
Resolution of the Trinity River issue will likely reduce the number of years when carryover storage and temperature goals can be met. This would seem to affect the background against which project operations were happening in the Biological Assessment. The gaming experience suggests that EWA actions can increase the likelihood of meeting temperature goals for winter-run and fall run. On the other hand, greater project capacity at the export facilities would seem to translate into an increased likelihood of inadequate carryover storage in Shasta.

For Delta smelt, the only parts that were not codified under the 1995 Water Quality Control Plan seem to be the Export/Vernalis target and the take issues. Since the projects are operating to different goals, in regard to San Joaquin flow conditions, than those in the WQCP a reconsultation on this part of the project description would seem to be in order. Since the VAMP Export/Vernalis ratios are all smaller than the Opinion or WQCP targets, long-term implementation of VAMP would seem to reduce the number of smelt expected at the export facilities.

Quandry
If the projects treat their take statements as 'limits' than they would logically aim for the

greatest level of expected take that avoids a jeopardy opinion. Things like lower export ratios and flexible pumping schedules produce lower expected levels of take while restoration actions aimed at the same goal require contrary take statements. Somehow, take limits for CalFed must reconcile take statements for program aspects that are steps toward recovery from those which are increased risks to recovery.

Letter of consent/4 pumps agreement (COE, DFG)

Relaxation of the restrictions on the state's physical capacity are assumed to be lifted as Stage I proceeds. This year, restrictions on pumping were lifted by 500 cfs for about 90 days. The restrictions are included in a letter from COE to DWR.

We have discussed a couple of ways that relaxation of this standard might apply. This year's actions recognized that flows of 2000 cfs on the San Joaquin obviated the need for some of the restriction. Those needs include, water elevation, striped bass entrainment, water quality in the south delta, and levee stability. We have done very little work, in the Calfed arena, to identify what triggers for flexibility of this requirement might be. Much work of the ISDP team could probably be used to rapidly produce suitable recommendations.

The casual nature of this requirement suggests that it would be possible to revise it quickly if all interested parties could be brought to agreement.

Export/Inflow relaxations

This standard was written to be flexible because the intended target of protection was sporadic and variable. After four years, the ops group has seldom had occasion to use this flexibility largely because of the wet hydrology each year. However, discussions within the Ops Group have identified choke points in the implementation of flexibility that the group is now struggling to address. Initially, Order 98-6 required that any water pumped for the environment had to be used within 6 months. I do not know the current status of this requirement but believe that as long as it is in an implementing order, rather than the WQCP itself, change should be relatively (we should consult with Nick on likely timelines) easy.

Pending standards (SWRCB, EPA, DOI)

As part of the 1995 WQCP, the SWRCB specified that several teams of biologists should be tasked with evaluating the needs of Suisun Marsh. Those reports are now final but the board has not yet adopted corresponding standards to protect the biological needs. Increases in the distribution and abundance of various wetland habitats described in the ERP would suggest that the Suisun Marsh may lose some of its uniqueness in the foreseeable future. The presence of different types of wetlands in the western delta and around Suisun Bay suggests that SWRCB should write its standards with clauses permitting easy reconsideration. The nature of these standards, combined with operational rules for the Suisun tidal gates could have substantial impacts on outflow requirements at certain times.

Department of Interior is pursuing two paths which are likely to affect operational requirements, although neither are truly standards. Renegotiating the contracts with CVP contractors could change both operations and perceptions. If the contracts are for more than percentage of usual deliveries will go down and use of joint point will likely be highly competitive; if contracts provide flexibility (eg higher in wet years and lower in dry years) than percentage delivery will be more consistent and more joint point water might be available. On the other side, implementation of b(2) is likely to use a series of default operating conditions that would have the effect of standards above and beyond the WQCP and Biological Opinions.

EPA and the SWRCB have struggled for years to develop toxic rules for state waterways. Deltakeeper has sued to prevent boating and waterways from spraying herbicides into delta waters and B&W expects to increase their application of cupric compounds several fold in the next few years. These actions have the potential to affect operations and should be analyzed for likely impacts in stage I.

Standards scheduled for revisiting during Stage I (FERC)

FERC licenses fall into this category.

BOR contract renewal conditions may also affect project operations

Rewriting water quality standards

Water quality standards in D-1485 and the 1995 WQCP are not scheduled for reconsideration during Stage I of CalFed but the potential exists to alter their implementation. The draft decision to implement the 1995 WQCP includes a clause that "variations in flow for experimental purposes for protection and enhancement of fish and wildlife may be allowed provided that such variations in flow shall not cause violations of municipal, industrial and agricultural objectives....." This clause seems to permit all environmental standards to be experimentally manipulated. Principally, the standards under discussion would be the minimum monthly delta outflows, the flow requirements corresponding to X2 requirements, the minimum monthly Sacramento River flows at Rio Vista, and the minimum monthly flows at Vernalis. However, the SWRCB has already used the corresponding language in d-1485 to permit experiments involving the Suisun Marsh salinity control gates that are not part of a flow based standard, so that the language of this clause would seem to extend to salinity standards as well as flow standards. It is unclear whether the dissolved oxygen standard would similarly be open to experimental testing. The approval of the Suisun salinity gates operation appears to approve an experiment to address one beneficial use by relaxing a standard associated with a different beneficial use. There also appears to be no requirement that the level of protection provided by the experiment be equivalent to that targetted by the standard. Thus, the draft decision would seem to greatly ease the flexing of standards for any purpose of the Environmental Water Account.

However, the biological opinions and critical habitat descriptions for delta smelt and winter-run salmon greatly restrict the flexibility that the state board might otherwise authorize.

People have talked about changing, flexing, or varying requirements in the WQCP and others embodied in D-1485. Timelines for rewriting and reimplementing such standards probably exceeds the time frame. The VAMP represents probably the quickest possible approach, but even that was presented as an implementation of the flow requirements rather than as a change in the standards and is still pending.

D-060435